No. 20,653

IN THE

United States Court of Appeals
For the Ninth Circuit

RICHARD C. PRICE,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

UNITED STEELWORKERS OF AMERICA, AFL-CIO
LOCAL UNION NO. 4028,

Intervenor.

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL UNION NO. 4028

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COUNTER-STATEMENT OF THE CASE

United Steelworkers of America, AFL-CIO (hereinafter referred to as "Steelworkers International") has for many years been the collective bargaining representative of the approximately 100 employees at the Santa Clara plant of Pittsburgh-Des Moines Steel Company (R. 15). When it organized these employees, in 1950, Steelworkers International chartered Local 4028. Local 4028 serves only this one plant and its only members are the employees at this plant.

Petitioner, Richard Price, was since 1951 an employee at the plant, and a member of Steelworkers International and Local 4028. (R. 17).

On April 15, 1964, Price filed a petition with the NLRB to decertify Steelworkers International as the bargaining agent (R. 16).[1] On May 13, 1964, three of his fellow employees filed charges within the union alleging that, by filing the decertification petition, Price had violated the Steelworkers' prohibition against "advocating or attempting to bring about the withdrawal from the International Union of any Local Union or any member or group of members." (R. 17). Price was tried before a Trial Committee of fellow employees which found him guilty. The Trial Committee's report was presented to the membership of Local 4028 — the employees in the plant — at a special meeting. A majority of the members at the meeting voted that Price be (1) suspended from membership in the Union and precluded from attending its meetings for five years; (2) fined $500 plus costs of hearing; and (3) suspended from membership indefinitely pending payment of the fine. (R. 17-18).

Under the Constitution of Steelworkers International, a member found guilty by his local union has an appeal as of right to the International Executive Board. Price filed such an appeal, and the International Executive Board rescinded all of the penalty except the five year suspension from membership and prohibition against attending meetings. (R. 18).[2]

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[1] Initially, Price mistakenly filed a union shop deauthorization petition, although intending to file a decertification petition. He subsequently corrected his error by filing a proper decertification petition (R. 16).

[2] The Stipulation of Facts recites that "the $500 fine" was rescinded (R. 18), and petitioner's brief suggests that this meant he was still obligated to pay the cost of hearing (Pet. Br. p. 6, n. 7). This super-literal reading of the Stipulation is unwarranted, however, for the International Executive Board's rescission of the fine was intended,

Price filed an unfair labor practice charge with the National Labor Relations Board, alleging that Local 4028's conduct violated Section 8(b)(1)(A) of the Act. The Board found no violation and entered an order dismissing the complaint. Price has petitioned for review of this order.

ARGUMENT

The complaint before the NLRB challenged both the suspension from membership and the fine as violative of Section 8(b)(1)(A). The NLRB, in dismissing the complaint, held (1) that the *suspension from membership* did not violate Section 8(b)(1)(A), and (2) that the rescission of the *fine* by the International Executive Board rendered unnecessary a determination whether it violated Section 8(b)(1)(A).

It is not at all clear that Price challenges the NLRB's holding that the *suspension* did not violate Section 8(b)(1)(A). His brief is devoted exclusively to his contentions that the NLRB should have passed on the validity of the *fine,* and should have ruled it invalid. Despite the absence of any attack upon the NLRB's ruling upholding the suspension, we shall devote the first portion of our brief to that ruling, for it is to us the most important aspect of the case. In a subsequent section of our brief, we shall discuss the NLRB's holding on the rescinded fine.

I. SECTION 8(b)(1)(A) DOES NOT LIMIT IN ANY WAY A UNION'S RIGHT TO SUSPEND OR EXPEL MEMBERS.

In this portion of our brief, we defend the NLRB's ruling that the Union did not violate Section 8(b)(1)(A) by suspending Price's union membership for five years.

It may be well at the outset to emphasize what this mem-

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and was understood, as erasing all penalties except the suspension and attendance bar. The NLRB so interpreted it (R. 25), and no attempt has been or will be made to collect the cost of hearing.

bership suspension did *not* do. It did not affect Price's employment status in any way. A union which suspends or expels a member for reasons other than nonpayment of dues cannot obtain his discharge from employment, nor may it in any other way interfere with his employment rights. See, e.g., *NLRB* v. *International Association of Machinists,* 203 F.2d 173 (9th Cir. 1953); *Union Starch & Refining Co.* v. *NLRB,* 186 F.2d 1008 (7th Cir. 1951). Moreover the suspension did not relieve the Union of its duty to represent Price in his dealings with the employer. A union which enjoys the status of exclusive bargaining representative is required to represent all employees in the bargaining unit — members and non-members alike — equally, fairly, and without discrimination. *Steele* v. *Louisville and Nashville Railway Co.,* 323 U.S. 192 (1944); *Radio Officers* v. *NLRB,* 347 U.S. 17, 46-48 (1954); *Moynahan* v. *Pari-Mutuel Employees Guild,* 317 F.2d 209, 211 (9th Cir.), cert. denied 375 U.S. 911 (1963).

Thus, the only effect of Price's suspension is to bar his participation in the internal affairs of the Union. He cannot attend its meetings, vote for its officers, or participate in other internal union events.

Section 8(b)(1)(A) does not protect the enjoyment of these internal union rights. Indeed it expressly disclaims interference with unions' denials of membership to employees:

> "Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents —
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7; *Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein...*" (emphasis supplied).

Congress intended the proviso to mean precisely what it says. As the House Report put it:

> *"In brief, a union may deny membership to an employee upon any ground it wishes,* but the only ground on which it can have him discharged under a union security clause is non-payment of dues and initiation fees." H.R. Rep. No. 245, 80th Cong., 1st Sess. 32 (emphasis supplied).

Section 8(b)(1)(A) was introduced on the Senate floor by Senator Ball as an amendment to the bill reported out by the Senate Committee. As proposed by Senator Ball, it had no proviso. Senator Holland thereupon offered the proviso as an amendment, saying:

> "I have had some discussion with . . . Senators [sponsoring Section 8(b)(1)(A)] in reference to the meaning of the pending amendment [to enact Section 8(b)(1)(A)] and as to how seriously, if at all, it would affect the internal administration of a labor union. *Apparently, it is not intended by the sponsors of the amendment to affect at least that part of the internal administration which has to do with the admission or expulsion of members,* that is, with the question of membership. So I offer an amendment . . ." *Legislative History of the Labor Management Relations Act of 1947* at p. 1139 (G.P.O. 1948) (hereafter referred to as "LH") (emphasis supplied).

Senator Ball immediately acknowledged his acquiescence in the proviso:

> "It was never the intention of the sponsors of the amendment to interfere with the internal affairs or organization of unions. The amendment of the Senator from Florida makes that perfectly clear . . . *It* [*a union*] *can expel him* [*a member*] *from the union any time it wishes to do so, and for any reason."* (LH 1141, 1142; emphasis supplied).

Additional legislative history to the same effect is gathered in a footnote hereto.[3]

In light of this explicit legislative history, it is not surprising that in the nineteen years since passage of the Act no union has ever been found to have violated Section 8(b)(1)(A) by expelling or suspending a member. The Board early held that expulsion and suspension cannot violate Section 8(b)(1)(A), *International Typographical Union,* 86 NLRB 951, 955-57 (1949), and its ruling won immediate judicial approval, *American Newspaper Publishers Association* v. *NLRB,* 193 F.2d 782 (7th Cir. 1951), *cert. denied* 344 U.S. 812 (1952). As the court there said:

> "Under [the proviso] Congress left labor organizations free to adopt any rules they desired governing membership in their organization. *Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as Section 8(b)(1)(A) is concerned.* This interpretation has support in the legislative history of the Act . . . It is not within the power of the courts to write into this section of the Act,

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[3] Senate Report No. 105, 80th Cong., 1st Sess. at pp. 20-21 (LH 426-427):

> "The Committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom . . . It is to be observed that unions are free to adopt whatever membership provisions they desire . . ."

Senator Taft, discussing a union member who was expelled from his union, and then discharged from employment, for testifying against a union shop steward:

> "In a case of that sort, the committee bill provides that the employer does not have to fire the employee. The Union can discharge him from union membership if it wishes to do so . . ." (LH 1420)

See also, to the same effect, colloquy between Senators Taft, Ball and Pepper, quoted in *Union Starch & Refining Co.* v. *NLRB,* 186 F.2d 1008, 1012, n. 1 (7th Cir. 1951).

by interpretation, language which would broaden its scope." (193 F.2d at 800; emphasis supplied.)

The rule is so clear that, in succeeding years, General Counsels of the NLRB have refused even to issue complaints where the charge was that a union violated Section 8(b)(1)(A) by suspending or expelling a member. NLRB Gen. Counsel Adm. Ruling, Case No. 189, 28 LRRM 1488 (1951) (suspension for filing decertification petition); NLRB Gen. Counsel Adm. Ruling, Case No. 1059, 35 LRRM 1167 (1954) (suspension for filing charges with NLRB); NLRB Gen. Counsel Adm. Ruling SR-927, 47 LRRM 1033 (1960) (suspension for attempting to supplant incumbent union with rival union); NLRB Gen. Counsel Adm. Ruling SR-2599, 52 LRRM 1370 (1963) (threat of expulsion for joining rival union).

Even those contending that *fines* can violate Section 8(b)(1)(A) have acknowledged that expulsion and suspension cannot. For example, former Board Member Leedom, dissenting from the Board's holding that a union did not violate Section 8(b)(1)(A) by fining members for exceeding work quotas, said:

> *"Congress preserved the right of unions to deny membership to, or terminate the membership of, whomever they pleased regardless of the reason;* but, at the same time, Congress insulated employees from coercion by making sure they would suffer no *economic consequences* as a result of such action." *Wisconsin Motor Corp.,* 145 NLRB 1097, 1111 (1964) (Emphasis supplied.)

To the same effect, see *Allis-Chalmers* v. *NLRB,* 358 F.2d 656, 658, 659 (7th Cir. 1966) (holding that a union violated Section 8(b)(1)(A) by fining members for crossing picket lines, but expressly recognizing that expulsion

would not have violated Section 8(b)(1)(A)[4]; and *Roberts* v. *NLRB,* 350 F.2d 427, 428, n. 2 (D.C. Cir. 1965) (holding that a union violated Section 8(b)(1)(A) by fining a member for filing unfair labor practice charges, and rejecting the union's reliance on the proviso because "imposition of the fine" is "too remote from a rule with respect to the acquisition or retention of membership.") See also, this Court's opinion in *Associated Home Builders* v. *NLRB,* 352 F.2d 745 (9th Cir. 1965) (leaving open the question whether a fine can violate Section 8(b)(1)(A), but apparently agreeing that expulsion cannot[5]).

The Supreme Court, in 1957, referring to the proviso in Section 8(b)(1)(A), concluded:

> ". . . the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied." *International Association of Machinists* v. *Gonzales,* 356 U.S. 617, 620.

Of course, since 1957, Congress *has* begun regulating internal union affairs. In Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §411—the "Bill of Rights of Members of Labor Organizations"—Congress created certain precise standards governing union discipline. Enforcement of these standards, however, was assigned to private actions in the federal district courts, not to

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[4] E.g. at page 658: "The parties agreed . . . that the Union may expel its members for any reason authorized by its rules *** Allis-Chalmers contended . . . that union discipline for such activity violates § 8(b)(1)(A) if it takes any form other than expulsion from the union." Again, at page 659: "Congress . . . did specifically make provision permitting disciplinary expulsion."

[5] At page 748: "The petitioner appears to recognize . . . that this section was directed against the use of physical force or threats of force or of economic reprisal . . . The argument is that the imposition of a fine amounts to economic reprisal."

the NLRB, and accordingly no change was made in Section 8(b)(1)(A). Moreover, in adopting these standards, Congress expressly preserved the union's right to discipline members who engage in acts of disloyalty to the union. A proviso to Section 101 (a)(2) of the LMRDA, 29 U.S.C. §411(a)(2), declares that "nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution."

A union faced with a decertification election must wage a strenuous campaign to persuade the employees to retain it. In conducting that campaign, its members must meet and decide upon their election strategy. The union cannot effectively wage that campaign if its opponents — the very persons seeking to decertify it — are entitled to "equal rights and privileges . . . to participate in the deliberations and voting upon the business of [its] meetings"—rights and privileges guaranteed to *members* by Section 101(a)(1) of the LMRDA, 29 U.S.C. §411(a)(1).

Just as a nation does not tolerate the activities of those who work for its downfall, a union engaged in a struggle for its survival cannot retain as members those seeking its demise. Nor, even after the immediate struggle is over, is a union likely to want to return to its ranks one dedicated to its eventual overthrow. Here, for example, the union won the decertification election (R. 16), but the members of Local 4028 have voted that Price not be permitted to attend its meetings for a period of five years (R. 17). Virtually every union constitution provides for the suspension of those who seek to defeat the union. The proviso to Section 101 (a)(2) was enacted to protect this legitimate union interest.

Of course, the only issue in this case is whether the union violated Section 8(b)(1)(A). We have mentioned the LMRDA only because the express Congressional approval in 1959 of discipline imposed for disloyalty reinforces the

conclusion that such conduct does not violate Section 8(b)(1)(A).

II. LOCAL 4028 DID NOT VIOLATE SECTION 8(b)(1)(A) BY IMPOSING A FINE.

We turn now to the second aspect of this case — the NLRB's disposition of the "fine" issue. The NLRB's decision on this point was as follows:

> "Although the Respondent also imposed a fine on Price, this fine was, as noted, later withdrawn by the International Executive Board following an appeal by Price from the action of the Respondent. As Price was therefore never obligated to pay a fine, we see no warrant for concluding that the initial levy of the fine ever became an operative factor in this case." (R. 27, n. 4.)

In other words, the NLRB held that in light of the International Executive Board's action, there was no need to rule on whether the fine, if it had become operative, would have violated Section 8(b)(1)(A).

Petitioner, challenging the NLRB's decision, contends that the NLRB (1) should have passed on the validity of the fine, and (2) should have found it unlawful. We deal with each of these contentions in turn.

A. The NLRB's Decision Not to Rule on the Validity of the Fine Was Within Its Discretion.

As an agency whose responsibility is to the public, the NLRB is vested with wide discretion in determining whether the public interest requires issuance of an order against a practice which has stopped, or which, though set in motion, never reached fruition.

Thus, while the NLRB frequently enters an order against an unfair labor practice, even though it has ceased, on the theory that the wrongdoer might repeat his conduct,[6] it

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[6] E.g. *NLRB* v. *Local 101, Operating Engineers,* 315 F.2d 328 (10th Cir. 1963); *NLRB* v. *United Hatters,* 286 F.2d 950 (4th Cir. 1961); *NLRB* v. *Local 751, Carpenters,* 285 F.2d 633 (9th Cir. 1960).

sometimes decides that in the circumstances of a particular case the danger of repetition is so unlikely as not to require issuance of an order to protect the public interest.[7]

The NLRB was surely within its discretion in concluding that this case falls into the latter category. As the NLRB noted, the fine voted by the membership of Local 4028 never became operative, because eliminated by the International Excutive Board on Price's appeal. There is nothing in the record to suggest that the International Executive Board would rule differently if a similar case arose in the future. The NLRB could therefore reasonably conclude that, in light of the determinative role played by the International Executive Board in this case, there exists no need for intervention by a public agency.

Indeed, it is a fundamental tenet of our national labor policy to keep public intervention in the internal affairs of unions at a minimum.[8] To effectuate this policy, maximum latitude is accorded union appellate procedures, in the hope that they will "moot" disputes and render public intervention unnecessary.[9] In this very case, the union's appellate machinery resulted in the rescission of the fine, and its elim-

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[7] E.g. *Whyte Manufacturing Co.,* 109 NLRB 1125 (1954); *Fleetwood Trailers,* 118 NLRB 1355 (1957); *General Dynamics,* 145 NLRB 752 (1963); *Robertshaw-Fulton Controls Co.,* 127 NLRB 64 (1960); *International Woodworkers,* 131 NLRB 189 (1961); *The Crossett Co.,* 140 NLRB 667 (1963).

[8] S. Rep. No. 187, 87th Cong., 1st Sess. (1959), p. 7 (reporting out the bill which ultimately became the Labor-Management Reporting and Disclosure Act of 1959):

> "The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization . . . [I]n establishing and enforcing statutory standards great care should be taken not to undermine union self government."

[9] See, *e.g.,* the proviso to § 101(a)(4) of the LMRDA, 29 USC § 411(a)(4), and § 402, 29 USC § 482. Cf. *Air Line Stewards* v. *Transport Workers Union,* 334 F.2d 805 (7th Cir. 1964).

ination as a cause of dispute between the parties. The NLRB, by honoring that appellate action as determinative, has effectuated the public policy of nonintervention.

Petitioner attempts to liken this case to one in which a party who has engaged in an unlawful course of conduct stops only because threatened with Board litigation. But petitioner has misconceived what happened here, for this case is not at all like those it cites. In the first place, the allegedly unlawful conduct — imposition of a fine — never achieved fruition. The same Constitution which authorized Local 4028 to impose the fine authorized Price to take the appeal which eventuated in its rescission. (Stated another way, the determination by a subordinate body to impose a fine cannot be "restraint" or "coercion" if the fined member has an appeal as of right to a higher union body; there is not yet any final union action.). In the second place, this is not a case where the alleged wrongdoer, confronted with the threat of Board litigation, reversed its course — a circumstance casting doubt on the verity of its reformation. Here, rather, the fine was rescinded by Steelworkers International, which was not charged by petitioner with any wrongdoing, and whose conduct should be taken, at face value, as evidence that it thought the "penalty" unsuited to the "crime."

Finally, we note this Court's admonition in *Associated Home Builders* v. *NLRB,* 352 F.2d at 750-751, n. 9, that the validity of fines under Section 8(b)(1)(A) is an issue of much complexity, and that alternative solutions which make it "unnecessary to solve these problems" are desirable. We believe this consideration is an additional reason for sustaining the Board's exercise of discretion in not reaching or ruling upon the validity of the fine.

B. A Fine Enforceable Only By Suspension or Expulsion from Membership Is Within the Proviso of Section 8(b)(1)(A)

In the preceding section, we have shown that the Board acted properly in holding that the "fine" issue was effectively

resolved by the International Executive Board's action rescinding it. If the Court agrees, it will not have to pass on the validity of the fine under Section 8(b)(1)(A).

However, if this Court decides to reach the issue, we believe it must conclude that Local 4028's conduct did not violate Section 8(b)(1)(A).

At the outset, it is important to recognize the specific means dictated by Local 4028 for enforcement of the fine. The membership action suspending Price for five years, and imposing the fine, also provided that he was to be "suspended from membership completely, pending payment of the fine." (R. 18). In other words, Price's suspension would be continued beyond five years unless and until he paid the fine.

Traditionally, this has been the sole procedure employed by Steelworkers International and its local unions for enforcing fines. We are not aware of a single instance, in the thirty-year life of Steelworkers International, in which a suit has been brought to collect a fine, nor does petitioner cite any.

In light of the limited means of enforcement written explicitly into the disciplinary penalty imposed on Price, the fine imposed by Local 4028 was a "rule respecting the . . . retention of membership," precisely within the proviso to Section 8(b)(1)(A). It was nothing more than an indefinite suspension from membership, with a proviso that membership could be recaptured after five years by paying the fine to the Union. Price had the option of accepting permanent suspension from the Union without financial cost, or, *if he preferred,* regaining his membership by paying the fine.

As we showed in Part I of this brief, Local 4028 could have suspended Price permanently without violating Section 8(b)(1)(A). Surely its conduct did not become unlawful because it provided Price an option to return.

C. Even a Fine Enforceable in Court Does Not Constitute "Restraint" or "Coercion" Within the Meaning of Section 8(b)(1)(A).

We have shown that in this case the only means adopted by Local 4028 for enforcing the fine was continued suspension of Price's membership, and that its action fell squarely within the proviso to Section 8(b)(1)(A). Therefore the principal issue discussed in petitioner's brief—the validity of a judicially enforceable fine—is not presented by the facts of this case. Nevertheless, because petitioner has argued the point so extensively, we shall set forth our views.

Section 8(b)(1)(A) outlaws "restraint" and "coercion" of employees in the exercise of their Section 7 rights. Two factors must combine before a violation can occur: the employee must be exercising a Section 7 right, and the Union must "restrain" or "coerce" him in the exercise of that right. It is our contention that a union fine imposed upon a member for exercising a Section 7 right does not constitute the kind of "restraint" or "coercion" outlawed by Section 8(b)(1)(A).

It is true, of course, that a fine collectible in court is an economic sanction, and that it is "restraint or coercion in the ordinary meaning of those terms." *Roberts* v. *NLRB,* 350 F.2d 427 (D.C. Cir. 1965). However, the Supreme Court has cautioned against assigning to the words of Section 8(b)(1)(A) their ordinary meanings. *NLRB* v. *Teamsters Local 639 (Curtis Bros.),* 362 U.S. 274 (1960). The Court there noted that Section 8(b)(1)(A) represented a compromise between strongly conflicting viewpoints about the legitimate scope of labor union activities, and that an expansive interpretation of its terms would do violence to the Congressional compromise. The Court concluded that the words "restrain or coerce" constitute a " 'restricted phrase' to be equated with 'threat of reprisal or force or promise of benefits' ". 362 U.S. at 284. As the Court put it in *Radio Officers' Union* v. *NLRB,* 347 U.S. 17, 40

(1954), "The policy of the Act is to insulate employees' jobs from their organizational rights."

The legislative history of Section 8(b)(1)(A) demonstrates that it was directed exclusively against acts of violence and interference with job rights, and that Congress did not intend to limit in any way the Union's right to fine its members. The House bill as originally passed *had* contained specific provisions outlawing union fines for certain purposes. (Section 8(c), H.R. 3020, 80th Cong., 1st Sess. (1947)). These were eliminated by the Senate, and the House agreed in conference to their elimination. As the House Conferees explained:

> "Section 8(c) of the House bill contained detailed provisions dealing with the relations of labor organizations with their members. One of the more important provisions of this section—that limiting the initiation fees which a labor organization may impose where a permitted union shop or maintenance of membership agreement is in effect—is included in the conference agreement (sec. 8(b)(5)) and has already been discussed. *The other parts of this subsection are omitted from the conference agreement as unfair labor practices.*" H. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 46 (1947). (Emphasis supplied)

In view of the express legislative determination that fines were not to constitute unfair labor practices,[10] it is hardly suprising that, in the first 17 years of Section 8(b)(1)(A)'s life, no union was ever held to violate it by fining a member, regardless of the reason for the fine. The Board's consistent position was that fines, like suspensions and expulsions, are not among the means proscribed by Section 8(b)(1)(A).

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[10] There is considerable legislative history, in addition to that cited here, demonstrating the Congressional intent that Section 8(b)(1)(A) does not outlaw unions' fines. We have not set forth that history because we assume the Board will do so in its brief, as it did in *Associated Home Builders* v. *NLRB, supra.*

See, e.g. *Minneapolis Star and Tribune Co.,* 109 NLRB 727 (1954); *Wisconsin Motor Corp.,* 145 NLRB 1097 (1964); *Allis-Chalmers Mfg. Co.,* 149 NLRB 67 (1964). The one appellate court which passed on the question likewise held that fines cannot violate Section 8(b)(1)(A). *American Newspaper Publishers Ass'n* v. *NLRB,* 193 F.2d 782 (7th Cir. 1951), *cert. denied* 344 U.S. 812 (1952); cf. *Allen-Bradley Co.* v. *NLRB,* 286 F.2d 442 (7th Cir. 1961).

Two recent developments have unsettled this 17-year tranquility. First, the Board, in 1964, declared that union fines imposed upon members for filing unfair labor practice charges would henceforth be held violative of Section 8(b)(1)(A), *Local 138, Operating Engineers (Charles S. Skura),* 148 NLRB 679 (1964); *H. B. Roberts,* 148 NLRB 674 (1964), *enforced* 350 F.2d 427 (D.C. Cir. 1965). Second, the Seventh Circuit, by a 4 to 3 vote reversing the Board, has held that a union violates Section 8(b)(1)(A) by fining a member for crossing a picket line. *Allis-Chalmers* v. *NLRB,* 358 F.2d 656 (7th Cir. 1966). We shall briefly discuss each of these developments.

The *Allis-Chalmers* decision was rendered on rehearing *en banc.* In the original decision, a three judge panel unanimously ruled that the legislative history clearly demonstrates that Section 8(b)(1)(A) does not outlaw union fines, and therefore affirmed the Board. 60 LRRM 2097 (7th Cir. 1965). The Court reversed the panel decision, 4 to 3. The new majority included two of the members who had voted to affirm the Board in the panel decision, but who now "confessed error". Judge Knoch, writing for the new majority, explained that the vice of the original decision was that it looked to the legislative history. While, to be sure, the legislative history supported the panel decision, Section 8(b)(1)(A) is clear on its face, and therefore does "not require recourse to legislative history for clarification." 358 F.2d at 660. In strong dissents, Chief Judge Hastings and Judges Kiley and Swygert pointed to the Supreme Court's

admonition in *Curtis Brothers* that Section 8(b)(1)(A) must not be interpreted as it reads, but rather must be given a restrictive interpretation in light of the legislative history. We submit that the majority decision in *Allis-Chalmers* was plainly wrong, and that a comparison of the majority and dissenting opinions leaves little doubt that the dissenters' interpretation of Section 8(b)(1)(A) as not reaching union fines is correct.

While the decision on rehearing in *Allis-Chalmers* constituted an attack on the general proposition that fines cannot violate Section 8(b)(1)(A), the Board's decisions in *Skura* and *Roberts* do not. Indeed, in these decisions, the Board reaffirmed its view that Section 8(b)(1)(A) does not outlaw union fines imposed upon members for exercising Section 7 rights. 148 NLRB at 682. The Board purported to carve out a tiny exception—limited to cases where fines are imposed for filing unfair labor practice charges—because of the "overriding public interest" in assuring members' opportunities to expose wrongdoing by their union. Id. at 682. In effect, the Board declared that, in this limited area, it was subordinating the intention of Congress to what it considered more important considerations.

However laudatory may be the Board's zeal to serve "overriding public interests" at the expense of the Act, the fact is that it is accorded no such power. It cannot insist, as it does, that Congress exempted fines from the ambit of Section 8(b)(1)(A), and simultaneously contend that that rule must "yield" in one tiny area where it believes the rule injudicious. It is up to Congress, not the Board, to expand the Act if it deems it inadequate. The fact is that, despite widespread revision of the Taft-Hartley Act in 1959, Congress did not see fit to reverse the Board's consistent interpretation [11] of Section 8(b)(1)(A) as not outlawing fines for filing unfair labor practices. To the extent it desired to

[11] See, e.g. NLRB Gen. Counsel Adm. Ruling, Case No. K-103, 37 LRRM 1103 (1955).

limit imposition of fines or other forms of union discipline for suing the union, Congress entrusted enforcement to private lawsuits, under Section 101(a)(4) of the LMRDA, 29 U.S.C. §411(a)(4). It did not amend or expand Section 8(b)(1)(A).

The Board will undoubtedly urge the Court to distinguish this case from *Skura*. We believe, however, that such a distinction would be unwarranted, because *Skura* is plainly wrong. Therefore, if the Court reaches this issue, we urge that it hold squarely that union fines cannot violate Section 8(b)(1)(A).

One final word. The District of Columbia Circuit, in upholding the Board's *Skura-Roberts* rulings, gave a different reason for its action: that the *end* served by the fine was an improper one, and therefore within the scope of Section 8(b)(1)(A). It read the legislative history as exempting union fines only where their purpose was limited to influencing internal union affairs, and not where their purpose extended beyond such affairs. This confusion of means and ends has been expressly rejected by this Court. In *Associated Home Builders* v. *NLRB,* 352 F.2d 745, 748 (9th Cir. 1965), this Court recognized that "in §8(b)(1)(A), Congress was aiming at means, not at ends, and . . . this section was directed against the use of physical force or threats of force or of economic reprisal." Under Section 8(b)(1)(A), the *purpose* of the fine is not the issue. The sole issue, as this Court recognized, is whether "imposition of a fine amounts to economic coercion." (352 F.2d at 748). For the reasons set forth hereinabove, we submit that it does not.[12]

While we have answered at some length the contentions

[12] An alternative basis for resolving this issue is that fines are covered by the proviso, and therefore cannot violate Section 8(b)(1)(A) even if they constitute "restraint" or "coercion." For an exposition of this thesis, see the Board's decision in *Allis-Chalmers* and *Wisconsin Motors, supra.*

in petitioner's brief, we wish to reiterate what we said at the outset: we do not think this issue is presented by the facts of this case. Rather, the Court should affirm the Board's discretionary determination not to rule on the validity of the fine or, alternatively, it should hold that a fine enforceable only by continued suspension from membership is protected by the proviso to Section 8(b)(1)(A).

CONCLUSION

For the reasons set forth hereinabove, the Board's decision and order, dismissing the complaint, should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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